IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. [redacted]

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioner pravs that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the judgment in petitioner's favor of the District Court for the Northern District of Alabama, and rendered judgment for Nashville Bridge Company.

OPINIONS BELOW.

The judgment of the District Court (R. 410, 434) is unreported. The opinion of the Court of Appeals (R. 445, Appendix A) is reported at 276 F. 2d 171.

JURISDICTION.

The opinion and judgment (R. 465, Appendix B) of the Court of Appeals were entered on March 15, 1960. A timely application for rehearing (R. 469) was denied on May 23, 1960 (R. 489, Appendix C). The jurisdiction of this court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. In a diversity case does the state or the federal test of the sufficiency of the evidence to support a jury verdict apply? Did not the Fifth Circuit err in holding state law to be inapplicable?

2. Did not the Fifth Circuit's action in reversing Petitioner's judgment and rendering judgment for Respondent constitute a denial of Petitioner's rights under the Seventh Amendment of the Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Seventh Amendment of the United States Constitution is involved:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE.

This is a personal injury action brought by petitioner in the state courts of Alabama (R. 8). Petitioner was an employee of a consignee and was injured while unloading a railroad car, which had been loaded by respondent. The basis of petitioner's action was the alleged breach of the duty owed by respondent to petitioner under the laws of Alabama. Two railroads were joined as defendants but were acquitted of negligence in the trial court.

The cause was removed to the United States District Court for the Northern District of Alabama on petition of respondent and its co-defendants by reason of the diversity of citizenship of the parties (R. 1). Trial was had before a jury and a verdict rendered in favor of petitioner and against respondent in the amount of $58,000.00 (R. 408). The trial court overruled respondent's motion for new trial holding:

> "A careful review of the record in this case reaffirms the opinion entertained at the trial that there was evidence from which the jury could have found that defendant Nashville Bridge was negligent in loading the steel girders on the gondola car and thereafter breached its duty to plaintiff to warn him of a dangerous condition when engaged in unloading such girders and that there was evidence from which the jury could have found that plaintiff was guilty of no negligence which proximately contributed to his own injuries and damages". (R. 431)

It required, however, that petitioner remit all in excess of $30,000.00, and entered judgment for the reduced amount (R. 432, 433, 434).

On respondent's appeal the Fifth Circuit held that the evidence of respondent's negligence was not sufficient to

go to the jury and that respondent was entitled to a directed verdict. It thereupon reversed petitioner's judgment and rendered judgment for respondent.

The testimony showed that petitioner, Otis Hillary Ritch, was employed as a structural iron worker by an erection company in connection with a construction project at Republic Steel's plant in Gadsden, Alabama. On November 22, 1956, while Ritch was assisting in the unloading of a large steel girder from a gondola freight car, the car turned over and Ritch, who was then on top of the girder, was seriously and permanently injured.

The girder in question, along with a slightly smaller girder, had been fabricated by respondent, loaded by it at its Bessemer, Alabama plant, and shipped by rail to Gadsden (R. 92). No unloading instructions were forwarded (R. 166). The girder in question weighed slightly over 50,000 pounds, and was 49 feet, 11 inches long. Lying on its side it was 7'-10" high and, as loaded, the width of the girder was 30" at the top and 24" at the bottom (R. 92, 153). The two girders were loaded in the freight car with approximately 7' between centers. They were loaded against the sides—approximately 1½" out from each side of the car (R. 153). They were bolted together by 4 or 5 steel plates (R. 199) and were braced at each corner by a 6" angle iron or "lug" which was welded to the bottom of the car. Upon arrival it was found that the larger girder had shifted slightly and that one or more of the lugs had pulled loose (R. 197, 199, 235). While loading the girders, respondent had shored up (braced) one side of the car (R. 123). Respondent is experienced in the loading of heavy steel girders, having shipped 50 to 100 per year in the last 25 years (R. 166).

These were the first girders unloaded on this job (R. 289, 290). In unloading the girders a "lifting lug", which

is a piece of metal with an oval hole in it, is bolted to the center of the girder so that it will take the hook on a crane, and is thereby lifted out (R. 290). Ritch's job was to bolt on the lifting lug or "hook on" (R. 289).

On the day before the accident Ritch had burned off the lugs and plates which were attached to the car and to the girders (R. 291). At that time the smaller of the girders was lifted out of the car (the smaller girder was taken out first because it was needed first). Ritch was merely working under the instructions of his "pusher", and had nothing to do with the decision as to which girder came out first (R. 290, 292). After the first girder was taken out it began to rain, and it was necessary that work be stopped. On the afternoon of the next day, Ritch and his co-workers went out to unload the larger girder (R. 292). Ritch climbed on top of the girder, and was in position to bolt on the lifting lug which had been set down on the girder (R. 294). He felt the car moving and jumped. The car overturned, Ritch was injured, and when he came to he was in the hospital (R. 294).

Otis Ritch had been an ironworker for about three and a half years before the accident (R. 289, 309). He had never taken beams as heavy as this off a box car, but had connected beams in a building which were this heavy (R. 309), and had taken a larger one off a truck (R. 301). He had unloaded a boiler which weighed 136 tons. It was not necessary to shore up the sides of the car at that time. The boiler was simply lifted straight up off the car (R. 306). Ritch agreed that if it had been necessary there were cross ties available with which they could have shored up the car. They had shored up a flat car when the large "3900" crane had been unloaded (R. 305). He also agreed that "it is possible" that the gondola car sagged a little when the smaller girder was taken out, and he further agreed that there was some tilt to the load

before it turned over (R. 311). He stated, however, that the load had been sitting there over a day, that there was not enough tilt to make him think it would turn over, and that he didn't have any idea that the car would turn over (R. 310, 311).

Two of Ritch's fellow-employees, both of whom were experienced ironworkers, described certain of the events that took place on the day of and the day preceding the accident. Mr. E. L. Robinson testified, in addition, that in his experience the only time a freight car had been shored up before it was unloaded was when a big crane or something of that sort was going to be run onto or off of a flat car—"walking it off" the side (R. 205). He had never seen a freight car turn over in the process of unloading. Milton Alvin Nabors also had seen cars shored up on occasions when a crane was brought in, or when there was something out of the ordinary. Nabors testified that special instructions on how to unload such loads come with the car or come in advance, but that no special instructions came with these girders (R. 242).

Republic Steel's yardmaster testified that at the place where the car overturned the track was level (R. 245). He also testified that this car was handled in the usual manner and that there was no report made of anything unusual in connection with its being spotted for unloading (R. 245, 248).

Mr. Bera Vance (not related to counsel) testified for petitioner as an expert witness. Mr. Vance is an ironworker with 35 years experience, having worked for practically all of the major steel erectors in the country (R. 269). For the last 15 years he has worked mostly on bridge work involving heavy steel girders. He has worked as foreman and superintendent (R. 269, 278). On one particular job he directed the loading of all girders over

a period of four years for the construction of a 12-span bridge at Newaygo, Michigan. On that job he loaded from 45 to 50 girders a year of comparable size and weight to the ones in the present case (R. 270, 274). Mr. Vance expressed the opinion that the manner in which the girders in the present case were loaded was improper (R. 273). He explained that you try to get the weight as near the center of the car as possible (R. 273).

On cross-examination, Mr. Vance testified that he doesn't believe that he has ever seen a girder loaded to the outside of the car as here (R. 279, 280). He denied that the girder was properly braced; saying in effect that having been improperly loaded it was braced in about the only way it could be (R. 280, 275).

In answer to the inquiry as to when cars are shored up in the usual procedure of unloading in the steel erection business, Mr. Vance stated that he had only shored cars when a big 3900 (a crane) was to be walked off the side of the car (R. 287). He stated that it has been customary to give special instructions to the people who are to receive a load if any unusual methods or precautions are to be taken in unloading a car (R. 287, 288).

Mr. Joe Robert White, a mechanical engineer at Southern Precision Pattern Works, identified scale models of the gondola car and girders in question which had been constructed by him based on his inspection of the blueprints of the girders together with the detailed information obtained by discovery, which was on the blackboard at the time of his testimony (R. 323, 324). The models were constructed to scale both as to size and weight (R. 317). The weight scale was accurate to a tolerance of 1% (R. 320, 321, 324). After they were received in evidence the models of the girder, lifting lug and human figure were positioned in the car to scale in accordance with

evidence previously adduced. When touched by a juror the model turned over and the accident was duplicated in the courtroom (R. 325). The models were transmitted to the Court of Appeals along with the record in the case, and will be available to this court.

When questioned concerning the amount of the gondola car's tilt after the small girder was removed and before it turned over, Mr. White testified that the car would have tilted two degrees and ten minutes (R. 330, 350, 351). His computation of the weights and forces at the time Ritch got onto the girder showed that despite the imperceptible tilt, a very critical point had been reached, and that there was then only a friction factor keeping the car from turning over (R. 348, 349).

Respondent's only witness was the manager of the company which employed petitioner at the time of his injury. He testified that it was usual and customary practice to load girders one on each side, to connect them with plates and to place angles at the bottom (R. 357). He said further that his company's usual practice since this accident has been to shore up under cars while unloading girders, but that they had not done so prior to the accident (R. 360). He denied that it is customary for a shipper of girders to notify him as to how they are to be unloaded (R. 361). This witness admitted that he was friendly to respondent in connection with this suit (R. 366).

REASONS FOR GRANTING THE WRIT

I.

In a Diversity Case Does the State or the Federal Test of the Sufficiency of the Evidence to Support a Jury Verdict Apply?

The first question presents a clear split among the circuits on an unsettled and very important facet of the Erie doctrine.

In its recent decision in **Dick v. New York Life Insurance Company**, 359 U. S. 437, this court took note of the conflict which exists in connection with the stated question. Because the issue was not properly raised, however, the court declined to reach out and decide "this important question", but expressly reserved it for an appropriate case wherein it was presented, briefed and argued.

This case squarely presents the question posed by the court in the **Dick** case. Here the Fifth Circuit refused to apply Alabama's rule determining the sufficiency of the evidence to support a jury verdict, and reversed the trial court's judgment on its holding that by the federal standard the petitioner-plaintiff had failed to prove his case. The circuit's rejection of the Alabama rule is not implied—it is specifically expressed.

The so called scintilla rule provides the measure in Alabama of the minimum quantity of evidence which will create a question for the jury and which will support a jury verdict on appeal. The rule was expressed in **Pappa v. Bonner**, 268 Ala. 185, 105 So. 2d 87, as follows:

> "The rule in Alabama is that in civil cases 'the question must go to the jury if the evidence or the

> reasonable inferences arising therefrom furnish a mere "gleam", "glimmer", "spark", "the least particle", the "smallest trace"—"a scintilla"."

It is a rule which evidence a public policy of substantial trust in the jury system within this jurisdiction. We deem it inappropriate to argue the justification of the rule. Obviously, however, it is materially different from the "substantial" evidence rule which the Fifth Circuit has applied and the distinction is vital to the outcome of this case.

For our present consideration the fact that a scintilla is sufficient to make out a jury question is the less important first half of the Alabama principle. Of greater significance is the fact that a scintilla is also sufficient to support the jury's verdict on appeal.

It is quite clear from a long line of Alabama decisions, including several recent ones, **Louis Pizitz Dry Goods Company v. Harris**, ... Ala. ..., 118 So. 2d 727; **Southern Apartments, Inc. v. Emmett**, 269 Ala. 584, 114 So. 2d 453; **Brandwein v. Elliston**, 268 Ala. 598, 109 So. 2d 687, that the judgment of a trial court is due to be affirmed although supported only by a scintilla of evidence so long as it does not conflict with the great weight of the evidence.

This aspect of the Alabama law is sometimes misunderstood by note writers who are examining the scintilla rule for the first time. The grant of a new trial when a verdict is contrary to the great weight of the evidence is, of course, not peculiar to Alabama. The Alabama procedure which is strange to federal practice is the requirement that sometimes makes necessary the submission of a case to a jury although it be apparent that the great weight of the evidence favors one of the litigants. This feature of the Alabama law is pointed out only for the purpose of

avoiding the confusion caused by some commentators, since there are neither procedural questions nor questions concerning the weight of the evidence presented here. A cursory reading of the record clearly reflects that the quantity of the evidence presented on behalf of petitioner greatly outweighed that of the respondent-defendant. The sole question considered in the Fifth Circuit, and which forms the basis for the present consideration, is the substantive one dealing with the sufficiency of that evidence.

As a second reason for granting the writ petitioner will show that the Fifth Circuit erred in concluding that his evidence failed to meet the federal test of sufficiency. For present purposes, however, we assume, as the Fifth Circuit held, that under the federal rule the evidence was insufficient to support the judgment, although the Alabama test was clearly met. The question necessarily presented is whether the federal or the state rule applies.

The Fifth Circuit's holding in this case is not based on any conclusion peculiar to the scintilla rule. It is simply an application of its established rule that state tests concerning the sufficiency of evidence are inapplicable in diversity cases.[1]

The Fifth Circuit position was originally grounded on this court's holding in **Herron v. Southern Pac. Co.**, 283 U. S. 91, which was decided prior to **Erie Railroad v. Tompkins**, 304 U. S. 64. **Erie** cast aside the line of authority which preceded it and, of course, within **Erie's** sphere of operation, the prior decisions are irrelevant. **Erie** was followed by **Stoner v. New York Life Insurance Co.**, 311 U. S. 464, where, applying **Erie**, this court held that the federal court was bound by a state court determination concerning the sufficiency of evidence.

[1] See for example *Poppe v. Great Atlantic & Pacific Tea Company* (CCA-8, 1957), 242 F. 2d 373; *Long v. Edenfield* (CCA-5, 1954), 211 F. 2d 705.

A usable test for the application of **Erie** came in **Guaranty Trust Company of New York v. York**, 326 U. S. 99, where this court held a federal court in a diversity case to be "in effect, only another court of the State", and concluded that it could not, therefore, substantially affect the enforcement of the right as given by the State. The key to **Guaranty's** amplification of the **Erie** rule was expressed as follows:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation as it would be if tried in a State Court."

Certainly one cannot imagine a more apt application of **Guaranty's** outcome test than the instant case, where the state rule requires affirmance of a verdict for the plaintiff and the Fifth Circuit's conception of the federal rule led to the rendering of judgment for defendant.

A majority of the circuits hold that the question has been settled in accordance with the **Erie, Stoner & Guaranty Trust** teachings. The Second,[2] Third,[3] Sixth,[4] Seventh,[5] Eighth,[6] and probably the First Circuits[7] have all

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[2] *Royce v. Pennsylvania Greyhound Lines* (CCA-2, 1956), 231 F. 2d 922.

[3] *Lenny v. New York Life Ins. Co.* (CCA-3, 1941), 122 F. 2d 871; *Cooper v. Brown* (CCA-3, 1942), 126 F. 2d 874; *Waldron v. Aetna Casualty & Surety Co.* (CCA-3, 1943), 141 F. 2d 230.

[4] *Lucas v. General Motors Corp.* (CCA-6, 1954), 212 F. 2d 805.

[5] *Rytex Co. v. Ryan et al.* (CCA-7, 1942), 126 F. 2d 952.

[6] *Clay County Cotton Co. v. Home Life Ins. Co.* (CCA-8, 1940), 113 F. 2d 856; *Twin City Hardwood Lumber Co. v. Dreger* (CCA-8, 1952), 199 F. 2d 197.

[7] *Schell v. Ford Motor Company* (CCA-1, 1959), 270 F. 2d 384.

concluded that under these cases the rules determining the sufficiency of evidence in diversity cases are taken from the state law. In the face of these holdings and on substantially the same authority the Fourth[8] and Fifth[9] Circuits have reached precisely the opposite conclusion.[10] The status of present confusion is dramatized by the fact that circuits on both sides of the question now hold that each of their opposite conclusions as to the meaning of **Erie** and **Stoner** are so well settled as not to admit of further inquiry. The seriousness of the matter is apparent when it is recalled that this is the facet of the **Erie** doctrine of most widespread application and greatest importance. It is the "everyday" problem which is presented in some form in virtually all jury trials in diversity cases.

The essential business of the federal courts concerning genuine federal questions places an increasingly serious load on our judicial structure. The discharge of this vital function is hindered within this circuit by the jammed dockets which result largely from forum shopping excursions of litigants in diversity cases. The differences which the Fifth Circuit has created between required proof in state courts and in federal courts, create concomitant ad-

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[8] *Crockett v. United States* (CCA-4, 1940), 116 F. 2d 646; *Burcham v. J. P. Stevens & Co.* (CCA-4, 1953), 209 F. 2d 35.

[9] *Reuter v. Eastern Air Lines, Inc.* (CCA-5, 1955), 226 F. 2d 443; *Ling v. Edenfield* (CCA-5, 1954), 211 F. 2d 705; *Pogue v. Great Atlantic & Pacific Tea Company* (CCA-5, 1957), 242 F. 2d 575.

[10] The Tenth Circuit has reached a conclusion somewhat akin to that of the Fourth and Fifth, but under distinguishable circumstances. See for example: *Diderich v. American News Co.* (CCA-10, 1942), 128 F. 2d 144, which illustrates a holding it has repeated several times to the effect that a provision has repeated several times to the effect that a provision of the Oklahoma Constitution requiring that the issue of contributory negligence should always be left to the jury, is inapplicable in the federal courts. This situation is distinguishable in that it gets into the judge-jury relationship and involves a state requirement as to *what* issue should go to a jury rather than *when* an issue should be submitted.

vantages to one or the other of the litigants in virtually every diversity case. The inevitable result is the insistence by the favored litigant that the cause be tried in the federal court.

The feared state court bias which caused the establishment of diversity jurisdiction is not a present day reality except in rare instances. Yet a flood of diversity cases continues to clog the dockets of our district courts for the obvious reason that counsel for one of the litigants would ordinarily be remiss in his duty if he failed to avail his client of the advantage which the Fifth Circuit bestows. The different result worked by the Fifth Circuit's rule cannot be reconciled with the **Guaranty Trust** holding,[11] much less with the obvious policy considerations connected with the administration of the federal courts. The bulk of the cases which overload the district courts within the Fifth Circuit rightly belong in the state courts. Such cases would be there in much greater number if the policy of the **Guaranty Trust** opinion were applied.

In the opposite situation the Alabama Supreme Court has consistently regarded the test of the sufficiency of evidence to be a matter of substance and has applied the federal test instead of its own in litigating rights created by federal law. **Zayatz v. Southern Ry. Co.**, 248 Ala. 137, 26 So. 2d 545; **Louisville & N. R. Co. v. Hall**, 223 Ala. 338, 135 So. 466.

In causes of action created by state law, the test of required proof is an integral part of the bundle of rights

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[11] And in addition, as petitioner hopes to show in brief following the grant of certiorari, neither can the Fifth Circuit holding be reconciled with *Byrd & Blue Ridge Cooperative*, 356 U. S. 525; *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U. S. 198; *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U. S. 530; *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, and the related cases which have sprung from *Erie*.

created—the measure of the rights which the law affords. Six Circuits have correctly determined that the test is to be provided from the law of the creating state. Under the Fourth and Fifth Circuit view the **Erie** principle is transgressed.

The issue posed in the **Dick** case is squarely presented and should be resolved in petitioner's favor.

II.

Did Not the Fifth Circuit's Action in Reversing Petitioner's Judgment and Rendering Judgment for Respondent Constitute a Denial of Petitioner's Rights Under the Seventh Amendment to the Constitution?

Petitioner earnestly maintains that this is not "just another fact case." We recognize that obvious limitations properly restrain this court when it is called on to "second guess" the fact determinations of intermediate tribunals. Yet it is equally clear that expediency has not repealed the Seventh Amendment and that the right to trial by jury, which Blackstone termed "the glory of the English law", is no less precious than other constitutional guarantees. This court has never held that it will refrain from taking corrective action when either the pronouncements or the course of conduct of intermediate tribunals erode the right of trial-by jury.

With manifest disregard for this court's holdings, the Fifth Circuit has effectively deprived Otis Hillary Ritch of his right to a jury trial. We will undertake to show both constitutional and demonstrable policy considerations which make it vital that this court restore that right.

As explained in **Schulz v. Pennsylvania Railroad Co.**, 350 U. S. 523, questions of negligence call for the exercise of common sense and sound judgment, and under our system of justice, whether particular conduct does or does

not constitute negligence is a matter for a jury to determine. The extent of the review to be given the jury's conclusions of fact have been delimited by this court in unmistakable terms. Thus in **Lavender v. Kurn**, 327 U. S. 645, this court held:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But **where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent**, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable" (Emphasis added).

And, from **Sentilles v. Inter-Caribbean Shipping Corp.** (1959), ... U. S. ..., 4 L. Ed. 2d 142, the following quotation brings the principle even more clearly into focus:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35; 88 L. Ed. 520, 525; 64 S. Ct. 409, 15 N. C. C. A. N. S. 647."

The existence of the duty on which petitioner's claim is based has, of course, been long established.[12] The Alabama law was unequivocally spelled out in **Edwards v. Southern Ry. Co.**, 233 Ala. 65, 169 So. 715, as follows:

> "The shipper was under a duty to load the car in a safe condition for receipt by the consignee or its servants; and if such was not the fact or condition, it was the shipper's duty to notify the consignee or its servants of such danger."

The only factual question which the Fifth Circuit could properly review was whether there was any evidentiary basis for the jury's conclusion that respondent 'breached' the duty specified by Alabama law[13] and that such breach

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[12] See for example: *Elliott v. Hall*, L. R. 15 Q. B. Div. 315; *Winterstein v. National Cooperage & Woodenware Co.*, 301 Ill. 95, 197 N. E. 578; *Vandell v. National Fireproofing Corp.*, 230 N. C. 1, 79 S. E. 2d 223; *American Creosote Works v. Harp*, 215 Miss. 5, 60 So. 2d 514; *Flusk v. Erie R. Co.*, 110 F. Supp. 118; *Texas Employers Ins. Assn. et al. v. Texas Compress Co.* (Ct. of Civ. App., Texas), 284 S. W. 2d 922; *Owen v. Rheem Mfg. Co.*, 83 Cal. App. 42, 187 P. 2d 785; *Fouraker v. Hall & Morton, Inc.*, 162 Cal. App. 2d 668, 328 P. 2d 527; *Central Lube Co. v. Hixson* (CCA-8, 1953), 203 F. 2d 544. See also the analogous statement of duty in *United States Cast Iron Pipe & Foundry v. Williams*, 213 Ala. 115, 104 So. 28, 31.

[13] The instructions to the jury were patterned after the quoted extract from the *Edwards* case (R. 371 to 382).

We take it that the court's holding is simply that the evidence of respondent's negligence was insufficient to go to a jury. Some confusion arises out of what appears to be a calculated ambiguity in the next to last paragraph of the opinion, making reference to assumption of risk and contributory negligence. No defense of assumption of risk was even raised. If ever applicable in cases such as this, it is only applicable when the plaintiff knows, and appreciates the danger. *Shelby Iron Co. et al. v. Cole*, 208 Ala. 657, 95 So. 47; *Edwards v. Southern Ry. Co. et al.*, supra. Similarly, under Alabama law, contributory negligence requires actual appreciation of danger to be applicable in cases such as this. *Foster & Creighton Co. v. St. Paul Mercury Indemnity Co.*, 264 Ala. 581, 88 So. 2d 825. It was not disputed that petitioner had no actual knowledge or appreciation of danger. Although a consideration of the men-

proximately caused **or contributed to**[14] the injury of the petitioner.

The jury apparently had no difficulty in reaching its decision in something less than an hour (R. 428). A distinguished trial judge, with many years of judicial experience, who had seen and heard the witnesses and who had a "feel of the case which no appellate transcript can impart"[15] was clear to the conclusion that the evidence showed breaches of **both** aspects of the duty imposed by the law of Alabama (R. 431). Not only does the Fifth Circuit hold that both judge and jury were wrong in their conclusions, it holds that they were so completely and absolutely wrong as to require the extreme action of its rendering judgment for defendant and thereby forever depriving a previously successful litigant of the right to have his case decided by a jury.

When, as here, the evidentiary basis of the jury's verdict is apparent, a conclusion such as was reached by the circuit court can spring only from a concept of the appellate function in direct conflict with the Seventh Amendment.

It was not disputed that respondent gave no warning of danger, nor did it forward any special instructions concerning required extra precautions or unloading procedures. In the absence of special precautions, the position of the load made the accident inevitable. Unchallenged

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tioned defenses would be governed by the same principles as set out in this petition, it would appear that the circuit court's decision should be considered as confined to the issue of primary negligence as is indicated throughout its opinion.

[14] The principle of concurrent negligence is recognized in Alabama. *Caudle v. Birmingham Electric Co.*, 247 Ala. 34, 22 So. 2d 417; *Watt v. Combs*, 244 Ala. 31, 12 So. 2d 189; *Central Tube Co. v. Herzog* (CCA-8, 1953), 203 F. 2d 544; *Restatement of Torts*, Sec. 308, p. 1080.

[15] *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212.

expert testimony showed that before the car overturned it had already reached a very critical point and was being held up only by a friction factor. Positioned more to the center of the car, a load would never have caused it to overturn—even if enough weight were added to crush the car. Respondent had deemed it necessary to shore up under one side of the car while loading it. But this fact was not communicated to the consignee, and in the combined experience of all the witnesses, including respondent's witness, a freight car had never been braced or shored up while a load such as this was to be lifted straight off.

From these facts alone the jury could clearly have inferred that the respondent-shipper breached the duty which the law of Alabama prescribes. But, in addition, petitioner went directly to the ultimate question and presented opinion testimony of a loading expert. His qualifications were not challenged. As an expert he testified that the loading of the car as it was done by respondent was improper.

The Fifth Circuit summarily rejected the testimony of the expert, Vance, holding his opinion to have insufficient probative value. At the same time it dealt in the opposite manner with conflicting defense evidence, holding that by respondent's self serving assertions in answers to interrogatories "it was **proven** that the car was **properly** loaded with the girders." The process of reasoning by which evidence supporting a verdict is rejected while conflicting evidence is regarded as conclusive hardly conforms to the principles of the Seventh Amendment. Patently disregarding the rule that the appellate function is to search out the evidentiary basis of the jury's conclusion, the circuit court viewed the testimony of this key witness "as a whole" and on the basis of such consideration drew its own conclusions in conflict with those which the jury has drawn.

While rejecting petitioner's evidence of **improper** loading, the circuit court stressed respondent's contention that respondent's loading method conformed to **habit** and **custom** in the area. It is, of course, self evident that the jury was free to reject respondent's evidence to this effect, particularly in view of conflicting evidence from petitioner's witnesses. In addition, the circuit court's selective acceptance and rejection of evidence is based on a fundamentally faulty legal premise. While failure to take customary precautions may constitute negligence, conformance with custom does not of itself acquit one of negligence.[16] On the other hand whether conduct is or is not "proper" is at the very heart of cases such as this and is provable by expert testimony.[17]

Several comments in its opinion are characteristic of the circuit court's process of viewing the evidence in the light most favorable to its conclusion of no liability. In this connection petitioner denies that the girders withstood transportation without complication. Such assertion is itself in conflict with uncontradicted evidence. Petitioner denies that undisputed evidence showed that the girders themselves did not cause the injury or that the injury was caused solely by reason of the unloading method. These are conclusions which the court has elected to draw from the evidence—not the evidence itself. Petitioner also denies that the court properly viewed the testimony of the expert, White, as being of little or no efficacy, while at the same time attaching importance to White's partial

[16] *Texas & Pacific Railway Co. v. Behymer*, 189 U. S. 468; *American Coal Co. of Allegany County v. DeWese* (CCA-4, 1929), 30 F. 2d 340; *Louisville & N. R. Co. v. Hall*, 223 Ala. 338, 135 So. 406; Also numerous cases collected under Federal Digest, Negligence, key No. 5

[17] *Louisville & N. R. Co. v. Hall*, supra; *United States Cast Iron Pipe & Foundry Co. v. Williams*, supra; *Edwards v. Southern Ry. Co., Crawford Johnson & Co. v. Pryor Motor Co.*, 210 Ala. 108, 121 So. 388

agreement on cross-examination with a contention, which White protested was outside the field of his expert knowledge (R. 352).

Ultimately, however, the circuit court's characterization of the evidence is not the controlling point. The central issue concerns the inferences and conclusions to be drawn from that evidence. What is a reasonable conclusion to be drawn from the evidence and who makes the determination? This court has held this to be the essence of the jury function. By its action the Fifth Circuit emphatically disputes this court's holdings.

In reaching its decision the Fifth Circuit determined that the facts were not distinguishable from those in the case of **United States Steel Corporation v. McCraney** (CCA-5, 1958), 257 F. 2d 457. The correctness of the **McCraney** decision is, of course, not now before the court but this conclusion serves to illustrate the degree of distortion in the circuit court's view of the present facts. In **McCraney** the freight car was loaded in accordance with the rules of the American Association of Railroads which was held to be due care as a matter of law. The claimed negligence apparently involved the failure to take additional precautions which would have protected the plaintiff from the ordinary dangers which occur during the unloading of a properly loaded car. Here the car was not shown to have been loaded in accordance with the rules of the American Association of Railroads.[18] Petitioner's evidence showed that it was "improperly" loaded and that it was loaded in such a way that injury was inevitable unless extraordinary precautions were taken. Although both law and custom dictated that warning or

[18] As a matter of trial strategy petitioner reserved his showing of specific rule violations for cross-examination of the expert witnesses for defendants. Since no such defense evidence was offered, the record contains no proof of specific violations.

special instructions should be forwarded by respondent, such was not done. The very nature of the two situations was vastly different. The plaintiff in **McCraney** was injured when a stake fell after all its support was removed during unloading—a phenomenon clearly within the ordinary experience of man. Here a huge freight car, presenting a look of stability like the Rock of Gibraltar, overturned in a manner that was not foreseen or reasonably foreseeable by the experienced men who were working around the car. In **McCraney**, the danger resulted solely from the employee's failure to take normal precautions in the handling of a proper load. Here, Ritch's action would have been entirely safe, reasonable and proper if the girders had been properly loaded. He had a right to assume that the car was reasonably safe for his use.[19] He had no responsibility for any decision concerning extra precautions and, in the absence of a sign of danger, he was wholly justified in going about his duties as instructed in a usual and careful manner. The only genuine similarity between the cases is in the Fifth Circuit's result.

The circuit court cited its decision in **Southern Railway Co. et al. v. Edwards** (CCA-5, 1930), 44 F. 2d 526, to support its conclusion that respondent owed no duty which was here breached. That case has no current validity for the point cited in view of the pronouncement of Alabama law six years later in the same case by the highest court of this State.[20] But even so, neither **Edwards** opinion supports the Fifth Circuit's present position. Those cases dealt with an apparent peril and one which was, in fact, recognized. Here, although the physical characteristics

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[19] *Jackson v. Chicago, M., St. P. & P. R. Co.*, 238 Iowa 1253, 30 N. W. 2d 97; *Sundin et al. v. Edward Rutledge Timber Co.* (CCA-9, 1918), 249 F. 809; *Stickle v. Union Pac. R. Co.* (Utah), 251 P. 2d 869.

[20] *Edwards v. Southern Railway Co.*, 233 Ala. 65, 169 So. 715.

of the car were obvious, the danger was not, in fact, recognized and was not such that a man of ordinary intelligence could be expected to anticipate it. Knowledge of danger and knowledge of nothing more than the source of danger have substantially different legal consequences.[21]

A shipper is charged with knowledge of the dangers which are inherent in a shipment as loaded. Unless danger is obvious it has no right to expect that the shipment will be unloaded otherwise than in the usual manner. The law of Alabama imposes the duty to load so that the shipment may be unloaded safely and if such is not the case to give warning of the danger. It cannot be disputed that if this load had been positioned in the center of the car, it could have been unloaded in the usual and customary manner without any danger whatever of the car's turning over. There can likewise be no reasonable question but that, if warning had been given or unloading instructions forwarded, the injury would not have occurred. Even absent the testimony of the expert, Vance, petitioner's evidence made out a classic jury case. With such testimony it is manifestly unreasonable to hold that as a matter of law respondent was wholly free of negligence which contributed to petitioner's injury and that there is no evidentiary basis whatever for the opposite conclusion.

The propensity of the Fifth Circuit to "jump into the jury box" is well known. It is illustrated by the fact that over the past five years this circuit has lead all others in reversing judgments in cases such as this.[22] The Fifth

[21] *Atlantic Coast Line R. Co. v. Gary* (Fla.), 57 So. 2d 40; *Foster & Creighton Co. v. St. Paul Mercury Indemnity Co.*, 264 Ala. 581, 88 So. 2d 825.

[22] *Annual Reports of the Director of the Administrative Office of the United States Courts*, 1959, 1958, 1957, 1956 and 1955, Table C 2. That table for the years specified shows further that in the category "private civil" cases, the Fifth Circuit has averaged about one reversal for each three cases. All circuits, including the Fifth,

Circuit's record setting pattern of interference with jury awards exists despite, rather than because of, the character of this circuit's juries. Illustrative is the fact that out of all the personal injury and death cases in which the maimed and the mauled, the multiple amputees and the paraplegics have passed before the bar in the Northern District of Alabama, the all time record jury verdict is $65,000. Only a handful have amounted to a third of that amount. There are other districts within the Circuit where verdicts run even smaller. The conservatism of our juries should justify the least interference with their verdicts, rather than the most.

The Fifth Circuit's record of reversals proves little in connection with the outcome of any individual case. Collectively, however, its reversals show the importance of this Court's review when error by the circuit court clearly appears. By its record the Fifth Circuit announces to unsuccessful litigants "Appeal and we will retry your rejected factual contentions." It can hardly be doubted that if the clear pronouncements of this court concerning the scope and nature of appellate review of fact questions were actually applied by our circuit court the number of appeals on pure fact questions would decrease dramatically. It would be wholly unrealistic, however, to expect a change in the type of fact review indulged in by the Fifth Circuit in the absence of directly instructive measures by this court. By limiting its considerations to the exclusion of the question now presented, this court would ultimately add to, rather than subtract from, the workload being generated at the appellate level.

There is much more to this question, however, than considerations of administrative policy. In substituting its

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have averaged less than one in four. The proportion of the Fifth Circuit's reversals has been over 250% of that of the First Circuit, 170% of that of the Second, 173% of that of the Sixth and substantially higher than that of any other circuit.

judgment for that of the jury the circuit court has employed a transparent device for syphoning off the right to a jury trial by mislabeling questions of fact as questions of law. In his dissent in **A. C. L. R. Co. v. Futch** (CA-5, 1958), 263 F. 2d 701, the distinguished present Chief Judge of this Circuit stated:

> "Two per curiam reversals of our Fifth Circuit within the past few years have, in effect, admonished us that verdicts in diversity cases are protected by the Seventh Amendment. Nevertheless, with deference, I submit that the present decision makes it obvious that we have not yet learned that lesson."

With deference petitioner submits that these words are even more in point here. Under the facts presented, the extreme action of the Fifth Circuit in forever depriving this litigant of the award which he had received at the hands of a jury was a clear denial of the rights which the Seventh Amendment guarantees.

CONCLUSIONS

The Fifth Circuit erred in holding the state test of the sufficiency of evidence required to support a jury verdict to be inapplicable. The question presents a clear split among the circuits on an important question of general application. The conflict should be eliminated and the injustice to petitioner corrected.

The Fifth Circuit erred further in holding petitioner's evidence to be insufficient even under the federal test. It reached its conclusion by a technique of discounting petitioner's evidence, resolving conflicts in favor of the respondent, drawing inferences which were rejected by the jury and rejecting inferences which were accepted by the jury. By reweighing the facts, discarding a jury award and rendering its own judgment, that court has cruelly and

erroneously denied petitioner his rights under the Seventh Amendment. Both constitutional and policy considerations require that this action be reversed.

For the reasons set out above it is respectfully submitted that this petition for writ of certiorari should be granted.

.....

OTIS HILLARY RITCH,
Childersburg, Alabama,
Pro Se.

Affidavit of Service.

State of Alabama, }
Jefferson County. }

I, Robert S. Vance, of counsel for petitioner herein and an attorney of record for petitioner in the court below, depose that on the ..... day of August, 1960, I served a copy of the foregoing Petition for Writ of Certiorari on the respondent by delivering a copy hereof to Frank M. Young, Esquire, one of its Attorneys of Record, at 805 First National Building, Birmingham, Alabama.

.....

Robert S. Vance.

Subscribed and sworn before me at Birmingham, Jefferson County, Alabama, on this ..... day of August, 1960.

.....

Notary Public—State at Large.

My commission expires:

APPENDIX A.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 17890

Nashville Bridge Company,
Appellant,

versus

Otis Hillary Ritch,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(March 15, 1960.)

Before Tuttle, Cameron, and Wisdom, Circuit Judges.

Cameron, Circuit Judge: This appeal presents the question whether the record contains sufficient evidence to warrant submitting to the jury by the court below appellee Ritch's action against appellant Nashville Bridge Company for personal injuries sustained by him as the result of the capsizing of a railroad car, in which

he was performing duties for the consignee in connection with the unloading of a steel girder weighing approximately twenty-seven tons. Appellee charged that appellant was guilty of negligence when it loaded two large girders into a gondola railroad car by placing them substantially against the sides of the car instead of loading them at or near the center of the car.

The action was brought against appellant along with Southern Railway Company, owner of the car, and Louisville and Nashville Railroad Company, the carrier which transported it from Bessemer to Gadsden, Alabama. The court below directed a verdict in favor of Southern, and the jury returned a verdict in favor of L. & N. Its verdict was against appellant in the sum of $58,000.00 which, under the court's conditional ruling upon motion for new trial, was reduced by remittitur to $30,000.00. The appeal is from a judgment entered against appellant for that amount, no appeal being taken from the judgments in favor of the two railroad companies.[1]

Appellant had loaded the girders at its plant in Bessemer, Alabama into a 52 foot gondola car weighing 59,500 pounds. The girders were forty-nine feet eleven inches long and the larger one was seven feet ten inches high, weighing substantially twenty-seven tons. The smaller girder was six feet ten inches high and weighed about twenty-four tons. Each girder had a flange on each side

[1] Industrial Steel Erection Corporation, consignee in the shipment of the two girders and the employer of appellee, intervened to assert its claim against appellant for monies it had paid appellee under the Alabama Workmen's Compensation Act, and the jury returned a verdict in its favor for the amount so paid. The judgment entered on this verdict was set aside upon appellant's motion for new trial, the court holding that Industrial was guilty of negligence as a matter of law in the unloading of the girders, which barred its right to recover from appellant. No appeal was taken from that judgment.

and the girders were loaded on edge, about one and one-half inches from the opposite sides of the car.

The girders were held in upright position by connecting the top of each to the bottom of the other by steel angle irons forming an "X". The girders were pressed against one end of the car and were braced at the other end by lugs of angle iron welded to the bottom of the car.[2]

Before the first girder was loaded by appellant, the car was shored up on that side, the brace being removed when the loading of the second girder brought the load substantially into balance. The car was inspected by representatives of the railroad and no exception was taken to the manner of loading. It was transported without incident by the L. & N. Railroad Company from Bessemer to Gadsden, Alabama, where it was delivered to the plant of Republic Steel Company, where construction work was in progress. Industrial was in charge of the work and unloaded the girders and put them in place on top of steel columns by the use of a large crane.

Appellee was employed by Industrial to assist in the unloading, and he first loosened the girders from each other and from the floor by burning the connecting braces and the lugs by the use of a blow torch. The smaller girder was removed first and was placed by the crane on top of columns already in place in the nearby building. This was accomplished on Wednesday, and the larger girder was left in place in the car until Thursday afternoon when the unloading crew began its removal from the car. Appellee's job was to bolt a lifting lug

[2] In the testimony and the statement of facts in appellee's brief it was shown that when the car arrived at destination one or more of the lugs had been torn loose, permitting the girders to shift slightly. Appellee's brief does not argue that this shifting contributed in any way to the appellee's injuries, so that this feature will not be dealt with further.

to the top flange of the larger girder to which the hook or shackle on the unloading crane would be attached. He climbed to the top flange of the large girder, taking with him his tools and the bolts for fastening the lifting lug to it. He walked along the flange to the middle of the girder, put the lifting lug in place, and was lining it up so that the holes in the lug would be opposite those in the flange of the girder. At that moment the car, because of the weight of the girder and the added weight of appellee (about 225 pounds) and of the lug (about 250 to 350 pounds), began to turn over. Appellee jumped towards the side of the car opposite that on which the girder was standing and received the injuries for which suit was brought.

Besides himself, appellee used as witnesses two fellow members of the unloading crew. He also placed upon the stand Bera Vance and Joe Robert White as expert witnesses.[3] Vance was an iron worker, living at the time in Birmingham, Alabama, whose experience had extended over a period of about thirty-five years. He had been back in Birmingham about two years after spending considerable time in the northern part of the United States, mainly in the Detroit, Michigan area. During that time he was engaged in handling an average of about fifty heavy girders per year. He had worked for a time directing the loading of girders, but most of his work had been spent in unloading.

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[3] Appellee also introduced a car repair helper of L. & N. Railroad who had examined the Southern car in which the shipment had moved, about two years after the movement. The court limited his testimony largely to the case against Southern Railway Company. The only testimony which could be of probative value as between appellant and appellee was his statement that the distance from the center of the car trucks to the center of the side bearings "where the load is supposed to rest on the center plate on the bolster of the car" was 24 inches. From that point to the outside of the gondola car was 33 inches.

In response to a hypothetical question in which was included reference to a picture not identified in the question, and over the objection of appellant, he was permitted to testify that in his opinion, the loading of the two girders along the outside edges of the car was improper.[4] Upon cross-examination he stated that different manufacturers and shippers had different methods of loading girders; and further that a girder loaded as was the one which caused the injury could have been removed from the car by shoring it up—although he had never seen this done except where a much heavier object such as a big crane was being taken out of the car.[5] He further testified that it was customary

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[4] "A. In other words, with this car loaded with these two girders to the outside of the car would be improper. Is that the question? Would it be or would it not be?

A. Well, sir, if I was loading the car

Mr. Young: We object to that.

The Court: Well, I sustain that. They are not asking for your opinion.

A. My opinion is that it was improper.

Q. All right, sir. Explain why?

A. Well, in loading any car a guy is going to try to get the center of his weight as near the center of the car as possible."

He repeated the same idea later in his testimony: "In other words, loading anything a guy would try to keep the center over the center of gravity."

[5] "Q. In other words, the shipper loads them and then the person to whom it is being shipped unloads them?

A. Right.

Q. You know what you are doing when you load it?

A. Yes, sir.

Q. And different manufacturers and shippers of these things have different methods of loading them, don't they?

A. Yes, they do.

Q. And one company will think one way is the best and you go over to some other company and they think their way is the best, don't they?

A. Well, I imagine everybody thinks his own idea is the best.

Q. And they generally use their own system. He says that is right. He nodded his head. And when it comes out to the job

for the shipper to send special instructions if there were any special precautions to be taken in the process of unloading a freight car.

The witness White qualified as an expert in mechanical engineering, having recently taken courses at two Florida universities and having almost reached the point of receiving his degree. He had been employed by appellee to construct a model based upon information given him by the attorney in addition to evidence assembled by him in talks with others. He constructed a model of the railroad track, the gondola car and the two girders, using a doll to represent the appellee. The entire structure was of wood and it included everything the witness had learned to have been on the car except some minor details such as brakes and braking equipment.

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ate you or somebody else who is trained in that business is there to unload?

A. Yes, sir.

Q. And whether you know anything about that or not you consider that you are skilled in that work, don't you?

A. I do.

Q. And you know the responsibility is on you when you unload, don't you, you know it is your responsibility, don't you?

A. Sure.

Q. Of course you know that at any time you deal with heavy objects of that type of moving them around or crawling around on them there is always a possibility of getting hurt too, don't you, Mr. Vance?

A. Yes.

Q. And you always try to avoid being hurt I am sure, don't you, Mr. Vance?

A. Right.

Q. That is right. And I believe you said of course as everybody knows and you know, if anybody puts enough weight on the side of a car eventually if you just keep putting it up there you are going to reach the straw that breaks the camel's back and it is going to turn over. You know that, don't you?

A. Yes.

Q. And you know that there is a way of preventing it from turning over by putting these blocks up under the side that the weight is on. You know that, too, don't you?

A. That would stop it.

The model was set in place before the jury and various jurors were permitted to touch the large girder after the small one had been removed, and to demonstrate that the car would turn over by the addition of the weight of the doll. The witness testified that the added weight of appellee when he mounted the large girder was what, in his opinion, caused the car to overturn.

Upon cross-examination he admitted that it would be more difficult to fasten the girders to the car if they were placed at or near its center and that if, being so placed, they should break loose, they might cause the wrecking of the train.

The only witness used by appellant was J. W. O'Neal who was in 1956 General Superintendent of Industrial Steel Erection Company. He had for about sixteen years been engaged in fabricating and shipping steel and also in erecting it, and he represented his company in supervising the performance of the contract to erect the steel structure for Republic Steel. His plant was at Chattanooga, Tenn., and he testified that it was usual and customary in the territory in which Chattanooga and Gadsden are located to load similar girders just as appellant had loaded these; and that it was necessary to shore up the side of the car where the first girder was being loaded to sustain its weight until it should be balanced by the loading of the second girder. The work supervisor on the Republic job was a man who had been with Industrial only three months. After the injury to appellee O'Neal adopted the plan of shoring up one side of the car when unloading heavy girders or other objects and he stated that the materials for doing this, in the form of large timbers, were available close by the unloading site at the time the accident happened.

Appellee introduced in evidence three sets of sworn answers of appellant to interrogatories addressed to it by

appellee. By these answers it was proven that the car was properly loaded with the girders; that, as customary, the side upon which the first girder was loaded was shored up with timbers; and that there was nothing unusual about the loading and, therefore, the consignee was not given any suggestions concerning the unloading of the car: "This was left entirely to the consignee who were reputed to be qualified and experienced steel erectors." The answers further revealed that appellant had been loading girders of comparable size and weight over a period of years, the average for the last twenty-five years being fifty to one hundred large girders per year.

At the conclusion of appellee's evidence, appellant made a motion for a directed verdict on the ground that appellee's evidence failed to show that he was injured as the proximate result of any negligence on appellant's part, and further that the evidence affirmatively showed that appellee was guilty of contributory negligence. Ruling was reserved on the motion and at the conclusion of all of the evidence, it was denied. The court also denied appellant's motion for judgment notwithstanding the verdict.

Appellant contends on this appeal that there is no substantial evidence of negligence on its part which proximately contributed to plaintiff's injury. We agree with this contention. We think that principles which are decisive of this case were announced in the recent discussion of this Court in **United States Steel Corporation v. McCraney**, 1958, 257 F. 2d 457. In that case, McCraney received injuries by the falling of a stake upon him while he was in a gondola car assisting in the unloading of large steel pipe. We reversed the judgment in McCraney's favor and rendered judgment in favor of the Steel Corporation in response to four contentions of the Corporation.[6]

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[6] Points (1) and (2) were based upon the Corporations' contention that the loading had been done in obedience to the rules of the

It is true that our decision in that case was based in part upon proof that the loading was in accordance with the rules of the American Association of Railroads; but it is equally clear that the decision is based upon the other contentions of the Steel Corporation and that it would have been rendered even if the rules of the American Association of Railroads had not been a factor in the case. We quote at length from the case (257 F. 2d, pp. 460-462) language showing that our reversal of the judgment of the court below would stand independent of the proof of observance of the Association rules:

> ". . . appellant insists that the judgment should be reversed both because defendant proved compliance with the official rules and plaintiff failed to prove that defendant was guilty of negligence in loading the car, and because if there was negligence, it was not the proximate cause of plaintiff's injuries.
>
> "Urging upon us that the evidence shows as matter of law that the acts and conduct of plaintiff's employer and plaintiff, in failing to take proper precautions and in using unsafe and improper unloading methods, was in law and in fact the cause of plaintiff's injury, appellant points with conviction to the uncontradicted proof [that steps were not taken by plaintiff's employer which would have prevented the injury] . . .
>
> ". . . appellant . . . presents the further argument that if in any respect the loading was not as matter

American Association of Railroads. Points (3) and (4) were thus stated:

"(3) that the evidence shows as matter of law that the accident was caused by conditions arising after the loading and railroad journey of the car, which operated as effective and intervening factors, after loading and consignment, for which the appellant had and could have no responsibility; and (4) that the effect of the judgment is to impose upon appellant as a shipper of the goods the liability of an insurer."

of law entirely proper, the injury claimed was not foreseeable and, therefore, did not in law proximately result therefrom because the loader was entitled to assume that the consignee would make proper arrangements and have proper precautions taken against injury, . . . and if these had been taken the injury would not, indeed on the undisputed evidence could not, have occurred.

". . . .

"A careful examination of the record, as the briefs present and discuss it, and of the cases cited and relied on by both parties convinces us: that no case for a jury was made out; that a verdict should have been directed for the defendant; and that the judgment should be reversed. This is so . . . too, because, under the undisputed evidence, there was no latent or hidden defect in the loading, and if the slightest precautions with regard to the stake which fell on plaintiff had been taken by plaintiff's employer and by him, . . . the injury could not have occurred. Appellant was entitled to assume that reasonable care would be exercised by the consignee and his servants and agents in unloading the car, and, as matter of law, defendant could not have foreseen that the loading, which had no hidden or latent defects, and which had fully served its purpose to keep the load in place and bring it without injury to its destination, could be a cause of harm to the employees of the unloader. We think, in short, that under this evidence, which showed conclusively and as matter of law that the use of a simple precaution such as taking the stakes down before all of the pipes which held them in place were moved, would have prevented the injury, the principle to be applied here is that the duty of care imposed upon the defendant was to load the car so that, when it reached destination,

there would be no hidden defects in the loading, and that the consignee could, by the exercise of proper care, safely remove the lading. It owed no duty to the unloaders to see that in unloading proper safety measures were taken; this duty rested on the consignee and its employees. To hold otherwise would, in our opinion, be to impose upon the loader the responsibility of an insurer."

After discussing the Comparative Negligence Statute of Mississippi, we further stated:

"The issue of the case presented here, however, does not turn upon the contributory negligence vel non of the plaintiff but upon the negligence vel non of the defendant, which includes the foreseeability of the event. Under settled law, the loader of a shipment has the right to assume that the consignee or those who are in charge of the unloading for him will take proper precautions to avoid injury, and where, as here, it appears that plaintiff's injury was not due at all to negligence in the loading but solely to the failure of plaintiff's employer and of the plaintiff to take proper precautions in unloading, it must be held, as matter of law, that defendant was not negligent."

The facts of this case resemble the facts of **McCraney** so closely that it is not possible to apply the principles of **McCraney** to the facts before us without reaching the same result as we reached in that case. It was undisputed here that the girders were placed in the car in such a manner that they withstood the transportation without harm or complications; that the consignee was experienced in unloading heavy steel girders and that appellant was advised of this fact; that the girders themselves did not cause the injury to appellee; that appellee was injured solely because of the method employed in unloading the car; and that it was perfectly feasible to

unload the car without risk of such injury. Appellee, along with his expert Vance as well as every other witness asked about it, testified that even if the smaller girder should be removed first—a fact of which appellant was not advised—the removal of the larger girder could have been made perfectly safe by shoring up the side of the car where this tremendous weight was resting without the counterbalance which the removed girder furnished. It is equally true here, as in the **McCraney** case, that there was nothing hidden about the manner and method of loading the girders or that they were both along the outside edges of the car, so that their weight was entirely beyond the body-bolsters and the trucks which supported the car. And appellee, along with his witnesses, testified that the car "sagged" under the heavy girder after the smaller one had been removed. It was further uncontradicted that the method of loading adopted by the appellant was that then in general use in the territory where the shipment was made and handled. The only testimony to the contrary was that of Vance and it was based upon experiences in places far remote from the section of the contry in which the shipment was made and unloaded.

The testimony of Vance that the shipment was not properly loaded, if admissible at all, was not of substantial probative value sufficient to support a jury verdict. When pressed for the basis of the statement, the only thing he would say was that "in loading any car a guy is going to try to get the center of his weight as near the center of the car as possible." In a recent case arising in Alabama we held that the testimony of two witnesses that screws used in fastening a handle to a door were "not of the proper size" was not sufficient to warrant submission to a jury a case based on such insubstantial testimony. **E. I. duPont de Nemours & Co. v. Kissinger**, 1958, 259 F. 2d 411, 414.

Although appellant staked its chief reliance upon **McCraney**, discussing it on ten pages of its brief, appellee devotes very little space to his effort to distinguish that case from this one.[7] We agree with appellee that his statement is an over simplification and we feel also that it is lacking in merit. There was no more proof of negligence in this case than there was in the **McCraney** case. The evidence of negligence upon which appellee mainly relies is the testimony of the witnesses Vance and White.[8] The most that can be said of Vance's evidence,

---

[7] His effort to do so is in these words:

"Appellant relies heavily on the recent case of United States Steel Corp. v. McCrainey (C. C. A. 5, 1958), 257 F. 2d 457. . . . The question decided by this court concerned only the defendant's negligence. The Court held that defendant was entitled to a directed verdict, because ". . . the car was loaded in accordance with the rules of the American Association of Railroads, [adopted pursuant to statute] and therefore was not negligently loaded." As a second reason the court stated that the car was properly loaded, there was no hidden defect and that the simple precaution of removing the stake would have prevented the injury. Since injury resulted solely by reason of the failure of the plaintiff and his employer to take proper unloading precautions, there was no negligence which proximately caused plaintiff's injury as a matter of law.

"At the risk of over simplification we point out that the distinction between the present case and the McCraney case is that the evidence here proved Ritch's case, while in the McCraney case it did not. In McCraney the car was loaded in accordance with rules which are sanctioned by statute and as a matter of law was not negligent. It is significant that here no effort was made to show compliance with such rule. Except for a half-hearted attempt by the presentation of the friendly witness, O'Neal, no effort at all was made to dispute Ritch's evidence to the effect that the loading was improper and in such condition that unnecessary danger was inevitable. In McCraney the danger resulted solely from employee's failure to take reasonable precautions in the handling of a proper load. Here Ritch's action would have been entirely safe, reasonable and proper if the girders had been properly loaded."

[8] The testimony of White was of little or no efficacy towards establishing negligence. It was rather a demonstration of the obvious. It was undisputed that the car, which remained for more than twenty-four hours with the larger girder standing on edge at or against its side, was so balanced that the addition by appellee of five hundred pounds of weight caused it to overturn.

taken as a whole, is that different shippers used different methods of loading; that each shipper thought his method was best; and that Vance thought any method of loading except his own was improper. Impropriety, according to the opinion of one such witness, is not sufficient to establish liability. It is not enough to prove that other shippers used other methods and thought them to be best. Appellant was not an insurer, as appellee seems to contend in most of his argument.[9]

The burden remained upon the appellee throughout to establish by competent and substantial evidence that appellant did not exercise reasonable care, based upon the standard of what the average prudent man would have done under the circumstances then existing, to load the girders in a reasonably safe manner for unloading by a consignee skilled in such practices and exercising reasonable care in their execution.[10] Appellee's evidence simply fails to establish such a standard of care or appellant's failure to conform to it.[11]

While not stressing the contention that **McCraney** is not dispositive of this case on the ground that it was decided under Mississippi law, or pointing out any specific difference between that law and the law of Alabama, which controls here, appellee does rely extensively upon the Alabama case of **Edwards v. Southern Railway Co.**, 1936, 233 Ala. 65, 169 So. 715. While some isolated language of the

[9] Although at places admitting that negligence was the basis of his action.

[10] Kissinger, supra, 259 F. 2d at p. 414, and McCraney, supra, 257 F. 2d at 462.

[11] Appellee makes much of appellant's failure to prove that the girders were loaded according to standards set by the American Association of Railroads. Even as to this nonessential item of proof, the burden was upon appellee to establish such non-observance if he intended to rely upon it as an ingredient of negligence.

opinion of the Supreme Court of Alabama seems to be favorable to appellee's case, on the whole **Edwards** stands as better authority for appellant. Particularly is this true when it is read in connection with this Court's opinion in the same case six years earlier, **Southern Railway Co. et al. v. Edwards**, 1930, 44 F. 2d 526.

The administratrix of Edwards had recovered a judgment in the United States District Court for the Northern District of Alabama based upon "the alleged negligent failure of appellants to warn the consignee or the deceased, an employee of the consignee, of the alleged danger to the consignee or any person attempting to unload a carload of telephone poles resulting from the standards or stakes used on the sides of the car being too few or too weak." This Court reversed the judgment using this language:

> "We are aware of no valid reason for holding that a carrier is under a duty to give notice or warning of a condition which is so visible that any danger therefrom must be apparent to and appreciated by a person of ordinary intelligence, prudence, and experience who undertakes the unloading of a car.
>
> "Whatever danger there was to one undertaking to unload the poles from the car, due to their condition when they were ready to be unloaded, was of a kind as likely to be appreciated by a person of ordinary intelligence, prudence, and experience who might reasonably be expected to take part in the unloading as to any one acting for the shipper or the carrier. . . . It seems that it may be inferred that that danger might have been avoided by putting suitable side supports in the cuffs which had been left vacant on the side on which poles were not intended to fall, by bracing the load on that side with a prop or props resting on the ground . . ."

The Edwards estate thereafter proceeded with a suit in the Alabama courts, which resulted in a denial of recovery by the Supreme Court of Alabama in the decision above cited. The denial was placed, however, upon that court's finding that Edwards had been guilty of contributory negligence as a matter of law. That portion of the opinion is in these words (169 So. at page 719):

> "In Southern Ry. Co. et al. v. Edwards, 44 F. 2d 526, the Circuit Court of Appeals held that any risk attaching to the unloading of a car of poles by reason of a visible condition was, as between employee and employer, assumed by the employee; that under the undisputed evidence the negligence of the deceased in unloading the poles caused or proximately contributed to his death, precluding recovery against the carrier or consignor; that whether there was or was not a practicable way of avoiding the danger that overtook him, the deceased was negligent in incurring a danger which was open and apparent, done with a full knowledge of the situation, and which he voluntarily dealt with and which visibly involved his peril. We conclude as to this phase of the evidence that it was without conflict, and showed that it was the negligence of the deceased that proximately caused or contributed to his injury and death. This result prevents the asserted right of recovery. . . ."

Before announcing that conclusion, however, the Supreme Court of Alabama discussed at length the question of assumption of risk which had been included in our decision, supra, as one of the bases for rejecting the Edwards claim.

Appellee's brief quotes from the opinion of the Supreme Court of Alabama these words: "The shipper was under duty to load the car in a safe condition for receipt by the consignee or its servants; and if such was not the fact or

condition, it was the shipper's duty to notify the consignee or its servants 'of such danger.'' This language would seem to imply that the shipper was an insurer of the safety of the load, but appellee specifically disavows such a contention and admits that the basis of his suit is negligence.

This language of the Alabama court (169 So. at p. 717) is significant: ''The rules for giving or refusing general affirmative instructions need not be repeated. . . . The scintilla rule prevails in this state. The rule that obtains in federal courts in this connection does not apply in this jurisdiction. Louisville & N. R. Co. v. Parker, 223 Ala. 626, 138 So. 231; A. B. Small Company v. Lamborn & Company, 267 U. S. 248 . . .''

This Court has recently stated the same rule in a case applying Alabama law, **Reuter v. Eastern Air Lines**, 1955, 226 F. 2d 445:

> ''. . . In diversity cases, therefore, even since Erie, the scintilla of evidence rule prevailing in Alabama and in some other states has no application in the federal courts.
>
> ''In determining whether there is sufficient evidence to take the case to the jury, a federal judge performs a judicial function and is not a mere automaton. Gunning v. Cooley, 281 U. S. 90, 97, 50 S. Ct. 231, 74 L. Ed. 720. He must determine, 'not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it. . . . The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict.' . . . ''

Whether our decision is based primarily on failure of appellee to prove negligence by substantial probative evidence, upon assumption of risk, or upon appellee's

contributory negligence is not important. We conclude, as we did in **McCraney**, that the evidence before us does not make out a case against appellant.

The judgment of the court below is, therefore, reversed and judgment rendered here for appellant.

Reversed and Rendered.

A true copy:

Test:

Edward W. Wadsworth,
Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth
(Seal) Circuit, New Orleans, Louisiana.

Jun 16 1960

APPENDIX B.

Judgment.

Extract from the Minutes of March 15, 1960

Nashville Bridge Company,

No. 17896. versus

Otis Hillary Ritch.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and judgment rendered here for appellant, Nashville Bridge Company;

It is further ordered and adjudged that the appellee, Otis Hillary Ritch, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C.

In the United States Court of Appeals
for the Fifth Circuit

No. 17880

Nashville Bridge Company,

Appellant,

versus

Otis Hillary Ritch,

Appellee.

Appeal from the United States District Court for the Northern District of Alabama

Before Tuttle, Cameron and Wisdom, Circuit Judges.

Per Curiam:

It Is Ordered that the appellee's petition for rehearing be, and it is hereby Denied.

Extract from the Minutes of May 23, 1960

FILE COPY

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FILED
OCT 15 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 341.

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 341.

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE.

Petitioner's statement of the case needs amplifying to point out the additional significant facts.

There is no contention in the case that there were any hidden or latent defects in the load (R. 377). The loaded

gondola car was carried safely by the carrier (L & N[1]) from Respondent's plant at Bessemer, Alabama to Republic Steel Corporation's plant at Alabama City, Alabama (R. 88). After the car was loaded by Respondent's employees it was inspected by a representative of L & N at Respondent's Bessemer plant, with no exceptions taken to the load (R. 136-137). It then passed through the L & N yards at Boyles, Alabama and was subjected to the regular routine inspection by car inspectors of the L & N, and no exceptions were taken to the load or any defects discovered (R. 136-137). After delivery of the car by L & N at its Gadsden, Alabama yard there is no record of any exceptions or any defects in the load (R. 138). Upon delivery of the car to Republic Steel Corporation at Alabama City there were no exceptions noted or any defects noted in the load (R. 246-249).

The Mechanical Engineer, White, employed by Petitioner as an expert in statics, testified that it would be harder to keep the girders from shifting in transit if they were put nearer the center of the car; they would be more prone to shift if they were in that position (R. 352). He further testified that with a girder loaded near each side of the car, the car won't turn over (R. 353). All of Petitioner's witnesses testified that loading a girder on each side of the gondola car resulted in the load being substantially balanced. Petitioner admitted that when one girder was removed from the car it sagged a little (R. 303); that he felt the car shake when the little girder was taken out (R. 303). He knew that if enough weight was placed on one side of the car, with the 27-ton girder overhanging on the side, it would turn over (R. 306). He was an experienced man in unloading heavy loads (R. 309) and knew a balanced load from an unbalanced load (R. 309). Sufficient material was available, consisting of cross-ties

[1] Louisville & Nashville Railroad Company.

and heavy oak beams, to shore up the car (R. 305). He further admitted that if you put cribs under the remaining 27-ton girder, overhanging on one side of the car, "it would be just like putting pillows under a house" and without any pillows, "it is like a house without any foundation" (R. 311).

The witness O'Neal, the General Superintendent of Industrial Steel, the consignee of the shipment and charged with the duty of unloading the girders, testified that he knew as much or more about loading and unloading steel beams and girders than the shipper (R. 361). He further testified that Respondent's method of loading the girders constituted a good loading practice; it was the usual and customary practice followed by his company (R. 357).

Petitioner testified that he was doing lighter work since he returned to work on the 18th day of March, 1957 (R. 295) but was making more money than he formerly made before the accident (R. 300).

ARGUMENT.

The Respondent points out—

A. The state law will not destroy the entire Federal system with respect to the allocation of trial functions between judge and jury.

B. The Fifth Circuit's action in reversing Petitioner's judgment and rendering judgment for Respondent does not consfitute a denial of Petitioner's rights under the Seventh Amendment to the Constitution.

POINT A.

Alabama is the only state in the union which follows the former common law scintilla rule. South Carolina applies it in a modified form.[2] This rule was adopted in this country as a part of the English common law. However, in 1857[3] the English Courts abandoned the rule and this Court abandoned the rule in 1872.[4] The Federal Courts have again and again refused to apply the scintilla rule.[5] Although under the Alabama practice a scintilla of evidence will justify the submission of a case to a jury, nevertheless, the Trial Court and the Appellate Courts are duty-bound to set the verdict aside if it is— 1) not supported by the evidence, 2) contrary to the great weight of the evidence; or 3) if the verdict fails to do justice

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[2] Volume LVIII, Harvard Law Review, p. 178.

[3] *Toomey v. London Railroad Co.*, 140 Eng. Rep. 694.

[4] *Schuylkill & D. Improv. & R. R. Co. v. Munson*, 14 Wall. 442 (20 L. Ed. 867).

[5] *Gunning v. Cooley*, 281 U. S. 90 (74 L. Ed. 720); *Galloway v. United States*, 319 U. S. 372 (87 L. Ed. 1458); *Comrs. of Marion County v. Clark*, 94 U. S. 278 (24 L. Ed. 59); *Small v. Lamborn & Co.*, 267 U. S. 248 (69 L. Ed. 597); *Ewing v. Goode* (C. C.), 78 Fed. 443; *White v. New York Life Ins. Co.* (C. C. A.), 145 F. 2d 504; *Martin v. Burgess*, 82 F. 2d 321.

between the parties.[6] A scintilla of evidence will send a case to an Alabama jury, but it is not sufficient to support the verdict.

Petitioner, in effect, argues that after **Erie**[7] the Federal Courts should hold that regardless of the probative value of the evidence, a jury verdict should not be disturbed if it is supported by a mere "gleam", "glimmer", "spark", "the least particle" or the "smallest trace"—a scintilla. This is even contrary to the Alabama system of allocating the trial functions between judge and jury. Under the prevailing Alabama system a trial judge must submit the case to the jury if the plaintiff's charge is supported by a mere scintilla of evidence, notwithstanding the Court knows at the time that it is duty-bound to set the verdict aside on a proper motion if the verdict is against the weight of the evidence or if the verdict fails to do justice between the parties. Should the trial judge fail to set the verdict aside, then the Appellate Courts of Alabama are charged with this duty.[8]

The three Alabama cases cited by Petitioner on page 10 of his brief do not support his proposition that the judgment of a Trial Court is due to be affirmed if supported only by a scintilla of evidence so long as it does not conflict with the great weight of the evidence. In **Louis Pizitz Dry Goods Co. v. Harris**, ... Ala. ... (118 So. 2d

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[6] *Cobb v. Malone & Collins*, 92 Ala. 630 (9 So. 738); *New York Life Ins. Co. v. Zivitz*, 243 Ala. 379 (10 So. 2d 276); *Snow v. Allen*, 227 Ala. 615 (151 So. 468); *Harris v. Schmacling*, ... Ala. ... (120 So. 2d 731); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Robinson*, 269 Ala. 346 (113 So. 2d 140); *Schaefer v. Walker*, 241 Ala. 530 (3 So. 2d 405); *Holderfield v. Deen*, 269 Ala. 260 (112 So. 2d 448).

[7] *Erie R. Co. v. Tompkins*, 304 U. S. 64 (82 L. Ed. 1188).

[8] *New York Life Ins. Co. v. Zivitz*, supra; *Snow v. Allen*, supra; *Harris v. Schmacling*, supra (decided May 19, 1960); *Cobb v. Malone*, supra; *Franklin Fire Ins. Co. v. Slaton*, 240 Ala. 560 (200 So. 564).

727), the motion for a new trial dealt solely with the asserted excessiveness of the verdict; in **Southern Apartments, Inc., v. Emmett**, 269 Ala. 584 (114 So. 2d 453), there is no reference to the proposition urged by Petitioner; in **Brandwein v. Elliston**, 268 Ala. 598 (109 So. 2d 687), the Court merely announced the classic scintilla rule prevailing in Alabama.

Alabama also recognizes and applies a common law cause for granting a new trial, that is, where the verdict fails to do justice between the parties. This rule was announced in **Schaeffer v. Walker**, 241 Ala. 530 (3 So. 2d 405), where the Court expresses the rule as follows:

> "It is the duty of the trial court to set aside a verdict and grant a new trial, though the evidence is in conflict, if the trial court has a definite and well-considered opinion from the evidence that the verdict failed to do justice under the proper pleadings directing and guiding the trial. * * *"

In 1959 the Alabama Supreme Court in **Holderfield v. Deen**, 269 Ala. 260 (112 So. 2d 448), reaffirmed the **Schaeffer** principle that Alabama recognized the common law cause for granting a new trial as distinguished from the statutory grounds. The following language was used:

> "Code 1940, Tit. 7, § 276, sets out certain causes for granting a new trial. Among them is the following: 'That the verdict or decision is not sustained by the great preponderance of the evidence, * * *.' It should be noted, however, that we have held that the causes enumerated in § 276 are not the exclusive causes for granting a new trial; that 'courts of record have inherent power independent of the statute to set aside and vacate their orders and judgment within the term and for common-law causes.' * * * A common law cause for granting a new trial is that the verdict failed to do justice between the parties. * * *."

In Alabama the jury is not the sole judge of the sufficiency of the evidence to sustain their verdict. The Supreme Court of Alabama in **Franklin Fire Ins. Co. v. Slaton**, 240 Ala. 560 (200 So. 564), announced this principle.[3]

The Federal Rules of Civil Procedure were adopted to simplify legal procedure in the Federal Courts, eliminate technicalities, and expedite litigation. The Alabama system which, on the one hand, adheres to the scintilla rule and, on the other hand, places the duty on the judge and the Appellate Courts to set the verdict aside under the circumstances mentioned in this brief, is hostile to the spirit and purposes of the Federal Rules of Civil Procedure. The Alabama system, instead of expediting litigation, tends to prolong litigation. In a sense, the Alabama system is "shadow boxing". The end results are the same as the Federal system—the only difference is Alabama takes several technical steps to arrive at that end, whereas under the Federal system, it is handled in one step.

It is apparent that even though the Federal system does not recognize the scintilla rule and Alabama does, under either system the verdict must be supported by probative evidence.

If this Court should hold that the Alabama test is entirely different from the Federal test, then under **Erie**

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[3] The Court, in *Franklin Fire Ins. Co.*, supra, in announcing this principle, among other cases cited *Slocum v. New York L. Ins. Co.*, 228 U. S. 364 (57 L. Ed. 879), and held as follows:

> "It is within the peculiar province of the jury to determine the credibility of the evidence, reconcile conflicts therein, where possible, draw legitimate inferences therefrom, find the facts, apply the facts to the law as given in charge and express their conclusion in their verdict. However, the jury is not the 'sole judge' of the sufficiency of the evidence to sustain their verdict. The power to review their conclusion in civil actions at law is vested in the trial court in the first instance, and in this court on appeal. * * *"

the whole Alabama system must be followed, which would require the Appellate Court to weigh the evidence and determine the weight of the evidence before ruling on a motion for a new trial. This is contrary to the Federal system.[10]

Petitioner asserts on page 11 of his brief that the question of the sufficiency of the evidence is a substantive one and that this was the sole question considered by the Fifth Circuit in this case. Concededly, there is some confusion as to what is procedural and what is substantive. It is generally regarded that the method of proving a claim and rules of evidence should be treated within the domain of procedural law. This Court had recognized this principle before the advent of the Rules and was acted upon by the Court by the promulgated rules number 43 and 44 relating to the evidence.[11]

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[10] For general discussion of the Alabama scintilla rule, see Volume LVIII, Harvard Law Review, p. 178.

For a discussion of *Erie-Tompkins* on the question of the "sufficiency of the evidence," see Volume LVIII, Harvard Law Review, p. 173.

[11] American Law Institute, Conflict of Laws, pp. 700-702; Volume Three of Beale's Conflict of Laws, para. 594.1 at p. 1607; Volume LVIII, Harvard Law Review, commencing p. 178; 5 Moore's F. P. 43.02 (2), p. 1310.

In 5 Moore's F. P., para. 38.10, the treatise deals with "the effect of *Erie-Tompkins* on sufficiency of evidence to present question for jury." In 5 Moore's F. P., para. 43.02 (4), pp. 1314, 1315, the treatise provides:

> "As heretofore noted the relation of state law to federal evidentiary development prior to Erie v. Tompkins and the Federal Rules revolved principally around the conformity statutes. In the field of actions at law there was good authority to the effect that the Conformity Act was controlling in matters of evidence but in general the courts looked to the Rules of Decision Act. Since both acts were in force it made little difference which was regarded as controlling. Erie v. Tompkins undoubtedly introduced a new way of looking at law, but at the same time a fair balance is to be held between procedure and substance and a fair working area left for the Federal Rules and such other rules as may properly be promulgated."

The question of "sufficiency of the evidence" to support a verdict is inseparably connected with the Federal system of distributing trial functions between judge and jury. Petitioner would now have this Court recognize the scintilla rule, which the Federal Courts have again and again denounced; and also, under the guise of **Erie-Tompkins**, destroy the entire Federal system with respect to the allocation of trial functions between judge and jury.

Petitioner attempts to brush aside the Court's holding in **Herron v. Southern P. Co.**, 283 U. S. 91 (75 L. Ed. 857), stating that since **Erie-Tompkins, Herron** is irrelevant. This statement is not borne out by the Court's decision where it has cited **Herron**, supra, approvingly in numerous cases.[12] The latest two cases are **Byrd v. Blue Ridge Rural Elec. Coop.** (decided 1958), 356 U. S. 525 (2 L. Ed. 2d 953) and **Magenau v. Aetna Freight Lines** (decided 1959), 360 U. S. 273 (3 L. Ed. 2d 1224). **Byrd** and **Magenau** were both decided after **Erie, Stoner** and **Guaranty Trust.**[13] In **Herron**, supra, an action brought in the United States District Court for the District of Arizona, the Court directed a verdict for the defendant upon the ground that the plaintiff was guilty of contributory negligence, which action was contrary to the Arizona Constitution providing that the defense of contributory negligence or the assumption of risk in all cases should be submitted to a jury. The Court refused to be bound by the Arizona Constitution and upheld the action of the

[12] *Johnson v. United States*, 333 U. S. 46 (92 L. Ed. 468); *Quercia v. United States*, 289 U. S. 466 (77 L. Ed. 1321); *Croxell v. Benson*, 285 U. S. 22 (76 L. Ed. 598); *Wilkerson v. McCarthy*, 336 U. S. 53 (93 L. Ed. 497); *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333 (77 L. Ed. 819); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U. S. 525 (2 L. Ed. 2d 953); *Magenau v. Aetna Freight Lines*, 360 U. S. 273 (3 L. Ed. 2d 1224).

[13] *Stoner v. New York Life Ins. Co.*, 311 U. S. 464 (85 L. Ed. 284); *Guaranty Trust of New York v. York*, 326 U. S. 99 (89 L. Ed. 2079).

district judge in directing a verdict.[14] True this case was decided before **Erie-Tompkins**, but after **Swift v. Tyson.**[14a]

In **Byrd**, supra, the Court refused to follow the South Carolina workmen's compensation statute requiring certain factual matters to be decided by the judge. The Court cites **Herron**, supra, and comments on **Guaranty Trust**, supra, and fails to follow **Guaranty Trust** but follows **Herron.**[15] **Byrd** is cited with approval by the Court in the later case of **Magenau**, supra.

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[14] In *Herron*, supra, the Court said

"In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. * * * but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. * * *"

[14a] 16 Peters 1 (10 L. Ed. 865).

[15] The Court used the following language:

"* * * It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice.

"But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. The policy of uniform enforcement of state-created rights and obligations, see, e. g., Guaranty Trust Co. v. York (U. S.), supra, cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between

Petitioner relies on **Guaranty Trust**, supra, in support of his argument that the outcome of the case in the Federal Court should be the same as the outcome of the case in the State Court. However, in **Byrd**, supra, the Court held—"outcome is not the only consideration and criterion". **Byrd**, supra, and **Magenau**, supra, are the latest decisions of this Court on the point. They destroy the efficacy of Petitioner's criticism of **Herron** as well as his criticism of **Reuter, Ling** and **Pogue**[16] (pages 12 and 13 of Petitioner's brief).

The **Southern Railway Co.** case and **L & N** case cited on page 14 of Petitioner's brief[17] are not significant as they relate to the Federal Employer's Liability Act.

Petitioner makes a spurious argument on pages 13 and 14 of his brief concerning the "jammed dockets" in the Courts in the Fifth Circuit resulting from forum shopping excursions of litigants in diversity cases. The panacea offered by Petitioner is that the Fifth Circuit follow the rule announced in **Guaranty Trust.** In making this argument Petitioner overlooks **Byrd**, which followed **Herron** but failed to follow **Guaranty Trust.** Petitioner, in effect, argues that the Fifth Circuit should recognize the scintilla rule prevailing in Alabama. Again we point out that Alabama is the only state applying the strict scintilla rule. The cases arising in the only state in the Fifth Circuit ap-

judge and jury. Herron v. Southern P. Co., 283 U. S. 91, 75 L. ed. 857, 51 S. Ct. 383. * * * "

"We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts. * * *".

[16] *Reuter v. Eastern Air Lines, Inc.* (C. C. A.-5, 1955), 226 F. 2d 443; *Ling v. Edenfield* (C. C. A.-5, 1954), 211 F. 2d 705; *Pogue v. Great Atlantic & Pacific Tea Company* (C. C. A.-5, 1957), 242 F. 2d 575.

[17] *Zayatz v. Southern Ry. Co.*, 248 Ala. 137 (26 So. 2d 545); *Louisville & N. R. Co. v. Hall*, 223 Ala. 338 (135 So. 466).

plying the rule would not tend to eliminate the number of cases indicated by Petitioner.

The issues posed are not of such special and important nature as to burden this Court. There is presented here only "another fact case".

POINT B.

Petitioner seeks a review of his individualized personal injury case, in which the sole issue is the sufficiency of the evidence, and makes a specious argument that he has been denied his rights under the Seventh Amendment resulting from the Fifth Circuit's action in reversing and rendering the judgment. He contends he has "a bundle of rights" when, in fact, all he presents is "a bundle of complaints".

In order that he may have another day in court he criticizes the Fifth Circuit; he urges, in effect, that if he gets another day in court that the entire administrative policy of the Fifth Circuit will be changed. In effect, he concedes by his argument although he had only a modicum of proof, nonetheless, the action of the Fifth Circuit in reversing and rendering this cause impinged his rights under the Seventh Amendment.

This Court has repeatedly announced that it was not concerned with the individualized personal injury cases in which the sole issue was the sufficiency of the evidence. That its proper function related to issues which were of greater public moment and of national importance.[18]

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[18] See Justice Frankfurter's separate opinion in *Dick v. New York Life Ins. Co.*, 359 U. S. 437 (3 L. Ed. 2d 935);

Justice Stewart's opinion in *Scutilles v. Inter-Caribbean Shipping Corp.*, ... U. S. ... (4 L. Ed. 2d 142).

Justice Frankfurter, in *Dick*, supra, stated:

> "* * * Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the

This Court, over a hundred years ago, recognized the right of the Court to give a directed verdict and by doing so, constitutional rights were not impinged.[19]

This Court, as early as 1828, recognized that Federal judges are empowered to comment on the evidence to the jury, thereby enlarging the Federal judges' influence on the jury.[20]

This Court is committed to the principle that before evidence is submitted to a jury, the preliminary question for the judge is to determine whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, not whether there is little or no evidence. Also, where evidence is so overwhelming on one side as to leave no room to doubt what the fact is, the Court should give a preemptory instruction to the jury.[21]

It is undisputed that the car was carried safely from Bessemer, Alabama to Alabama City, Alabama (R. 88). It was twice inspected by representatives of the L & N

Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence. * * *"

[19] *Parks v. Ross*, 13 L. Ed. 730.

[20] *M'Lanahan v. The Universal Ins. Co.*, 26 U. S. 120 (7 L. Ed. 98).

Justice Black, in his dissent in *Galloway v. United States*, 319 U. S. 372 (87 L. Ed. 1458), stated that the district judge in *Tarter v. United States* (D. C. Ky.), 17 F. Supp. 691, represented his views with respect to the Seventh Amendment to the Constitution insofar as guaranteeing a jury trial in law cases. The district judge stated:

"The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is *substantial evidence to support the claim of the plaintiff in an action.* * * *" (Emphasis ours.)

[21] *Pennsylvania R. Co. v. Chamberlain*, supra; *Gunning v. Cooley*, supra; *Patton v. Texas & P. R. R. Co.*, 179 U. S. 658 (45 L. Ed. 361); *Pleasants v. Fant*, 22 Wall. 116 (22 L. Ed. 780).

and no defects were found in the loading. The trial judge declared there was no latent defect in the load (R. 377). The car was again inspected at Gadsden, Alabama, by L. & N representatives and nothing was found wrong (R. 138). Another inspection was made by Republic Steel Corporation at its Alabama City, Alabama, yards and nothing was found wrong with the load (R. 246-249). This is evidence of substantial probative value as to condition of the load and the method of loading. This evidence comes from four parties, none of whom were connected with Respondent.

Petitioner contends that his witness, Vance, was an expert; however, he doesn't contend that he was an expert in statics. Petitioner's expert witness in statics, White, testified that if the girders were loaded according to Vance's theory, that it would be harder to keep them from shifting in transit than as the girders were loaded (R. 352). The witness White also testified that with the girders loaded near each side of the car, the car wouldn't turn over in transit (R. 353). The most that can be said of Petitioner's evidence of negligence came from the witnesses Vance and White. We have here pointed out that White's testimony is favorable rather than unfavorable. The Court correctly paraphrases Vance's testimony when it says—"Taken as a whole, is that different shippers use different methods of loading; that each shipper thought his method was best; **and that Vance thought that any method of loading except his own was improper.** Impropriety, according to the opinion of one such witness, is not sufficient to establish liability." (Emphasis ours.) (Page 40, Petitioner's brief.)

Petitioner contends that Respondent should have furnished the consignee with instructions for unloading. The law never requires a needless act.[22]

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[22] The General Superintendent of the consignee (Industrial Steel) who was charged with the duty of unloading the girders

Petitioner, on page 23 of his brief, asserts—"There can likewise be no reasonable question but that if warning had been given or unloading instructions forwarded, the injury would not have occurred." The consignee admits he knew as much about the load and the unloading thereof as the shipper. Furthermore, the Petitioner had full knowledge of the conditions of the car and the dangers encountered in unloading (R. 310-311). Petitioner was an experienced man in unloading heavy loads and could tell a balanced load from an unbalanced load (R. 309). **He knew that if considerable weight was placed on one side of the car, with the 27-ton girder overhanging on the other side, it would turn over** (R. 306).

In the face of this positive evidence Petitioner urges that the Fifth Circuit's action deprived him of his constitutional rights under the Seventh Amendment.

This Court, in **Galloway v. United States**, 319 U. S. 372 (87 L. Ed. 1458), announced the following rule:

> "* * * If the intention is to claim generally that the Amendment (7th Amendment to the Constitution of the United States) (preserving the right of trial by jury) deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. * * *"

This Court should not be called upon to comb the evidence. The Fifth Circuit has done this; and after apply-

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testified that he knew as much or more about loading and unloading steel beams and girders than the shipper (R. 361). Would one who knew as much or more than the shipper about loading and unloading follow any instructions which might have been given by the shipper.

Kolbins v. Battle House Co., 74 Ala. 400; *National Surety Co. v. First Nat. Bank of Wetumpka*, 224 Ala. 423 (140 So. 544).

ing correct rules and standards, reversed and rendered this cause.

CONCLUSION.

We submit that the sole issue in this case is the sufficiency of the evidence to support Petitioner's personal injury case. It is of interest only to Petitioner and does not, under a smoke screen, present any constitutional issue.

The petition is not supported by a sound "Reason" calling for the exercise of this high Court's power and it should, therefore, be denied.

Respectfully submitted,

.....

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Attorney for Respondent.

Of Counsel:

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804 First National Building,
Birmingham 3, Alabama.

Certificate of Service.

I, Frank M. Young, Jr., Attorney for Respondent in this cause, certify that I have mailed a true copy of the foregoing Brief, postage prepaid, to the Honorable Robert S. Vance, of Counsel for Petitioner, at 1703 Comer Building, Birmingham, Alabama, on this the ... day of October, 1960.

.....

Frank M. Young, Jr.,
Attorney for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 341.

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

REPLY

To Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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PETITIONER'S REPLY.

Respondent's argument of the first of the two questions presented requires brief answer.

Any verdict which is contrary to the great weight of the evidence is, of course, due to be set aside under the law of Alabama. This state also applies the common law principle that empowers judges to set aside verdicts

which they deem manifestly unjust.' In no way does petitioner dispute these rules; they simply do not control the question which is now before the court.

The previously cited Alabama opinions clearly substantiate the principle originally urged by petitioner, i. e., under Alabama law a scintilla of evidence furnishes sufficient support for a verdict so long as it does not conflict with the great weight of the evidence. Nothing contained in the cases cited by respondent justifies any contrary conclusion.[1] Rather than sustaining its erroneous contention, respondent merely confuses the issue.

The Fifth Circuit held here that there was insufficient evidence to support the verdict—not that the verdict was against the great weight of the evidence or that it was manifestly unjust. The court's conclusion was based on its expressed holding that it is the federal and not the state test of sufficiency which obtains. That holding squarely presents the issue petitioner has raised.

The opinion of the Fifth Circuit in this respect was not based on any novel distinction which is limited to Alabama cases. The rule in this circuit is simply that the test of sufficiency of evidence in diversity cases is not to be taken from state law.[2]

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[1] It is petitioner's position that is supported in the leading case of *Cobb v. Malone*, 92 Ala. 630, 9 So. 738, which is among the cases cited by respondent (respondent's brief, p. 5, footnote 6): Assuming a case to have been properly submitted to the jury, it was held that "* * * the decision of the trial court, refusing to grant a new trial on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust."

[2] That the Fifth Circuit's holding is a general one, applicable to all cases, including those not involving the scintilla rule, is clearly demonstrated by its language and holding in *New York Life Insur-*

This question does not extend to the relative functions of a judge and jury or to the mechanics of the judicial process. Application of the state test of sufficiency of the evidence would neither disrupt the operation of a district court, affect the judge's responsibility to determine whether particular evidence does or does not meet the applicable test of sufficiency, nor diminish his power to direct verdicts. The question is simply whether state or federal law determines the quantum of evidence sufficient to meet the plaintiff's burden in diversity cases. Respondent does not dispute that on this question there is a clear split among the circuits.

If the confusion wrought by respondent succeeds in misleading the court into believing that the Alabama situation presents an added problem, then petitioner submits that this would be the logical starting place for the resolution of the conflict among circuits, for having resolved it in this case, the resultant rule could be applied in all cases. Even if such an added problem did exist, variations in state law would certainly not justify a unique distortion of the **Erie** principle applicable only in the district courts of one state.

Respondent's citation of para. 38.10 from 5 **Moore's Federal Practice**, 2nd Ed., points up the importance of the court's action in this field, since as is shown by the cases originally cited, Professor Moore's position is in direct conflict with that of at least five of the circuits.

As in our original petition, we reserve detailed argument on the merits of this question for a more appropriate

ance Company v. Sparkman (CCA-5, 1939), 101 F. 2d 484. The point is further illustrated by its reliance in *Pogue v. Great Atlantic & Pacific Tea Company* (CCA-5, 1957), 242 F. 2d 575, a case which does not involve the scintilla rule, or its prior holding in *Reuter v. Eastern Air Lines* (CAA-5, 1955), 226 F. 2d 443, a case which does involve the scintilla rule.

stage of this proceeding. We submit, however, that the petition has clearly presented an important conflict among the circuits that should be resolved.

Respectfully submitted,

.....

OTIS HILLARY RITCH,
Pro Se.

State of Missouri,)
St. Louis County.)

I, J. Guy Hood, depose that by direction of counsel for petitioner I have on this the 19th day of October, 1960, served a copy of the foregoing Reply on the respondent by mailing a copy via U. S. Air Mail, postage prepaid, to Frank M. Young, Esquire, Attorney for Respondent, at 805 First National Building, Birmingham, Alabama.

.....

Subscribed and sworn before me at St. Louis, Missouri, this 19th day of October, 1960.

.....

Notary Public.

My commission expires June 9, 1962.